

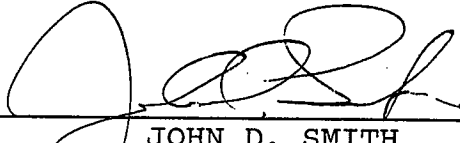
CALIFORNIA OFFICE OF ADMINISTRATIVE LAW  
SACRAMENTO, CALIFORNIA

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In re: )  
Request for Regulatory ) 1989 OAL Determination No. 88-009  
Determination filed by )  
the California Associa- ) [Docket No. 88-009] OF CALIFORNIA  
tion of Health Facilities )  
concerning the "Medical )  
Level of Care Guidelines" )  
issued by the Department )  
of Social Services )  
regarding Residential )  
Care Facilities for the )  
Elderly <sup>1</sup> )  
Determination Pursuant to  
Government Code Section  
11347.5; Title 1, California  
Code of Regulations,  
Chapter 1, Article 2

Determination by:

  
JOHN D. SMITH  
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney  
Debra M. Cornez, Staff Counsel  
Rulemaking and Regulatory  
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether the "Medical Level of Care Guidelines" concerning the level of medical care and procedures in residential care facilities for the elderly, issued by the Department of Social Services, are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law concludes that, from the time the Department issued the Guidelines until April 18, 1989, when the Department filed emergency regulations codifying the above-noted Guidelines, such Guidelines were in violation of the Administrative Procedure Act, except certain provisions of the Guidelines that restated existing regulatory law.

THE ISSUE PRESENTED 2

The Office of Administrative Law ("OAL") has been requested to determine<sup>3</sup> whether the "Medical Level of Care Guidelines" ("Guidelines") concerning the level of medical care and procedures in residential care facilities for the elderly ("RCFE'S"), issued by the Department of Social Services ("DSS" or "Department"), are (1) subject to the requirements of the Administrative Procedure Act ("APA"), (2) "regulations" as defined in Government Code section 11342, subdivision (b), and (3) therefore violate Government Code section 11347.5, subdivision (a).<sup>4</sup>

THE DECISION 5, 6, 7, 8

OAL concludes that, from the time the Guidelines were issued by DSS until April 18, 1989, when DSS emergency regulations were filed with the Secretary of State, thereby codifying the above-referenced Guidelines, the Guidelines were (1) subject to the requirements of the APA,<sup>9</sup> (2) "regulations" as defined in the APA, and (3) therefore violated Government Code section 11347.5, except where the Guidelines restated existing regulatory law.

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

Following an executive branch reorganization in 1978, the Department of Social Services was created to replace the Department of Benefit Payments. DSS is under the Health and Welfare Agency.<sup>10</sup> It is responsible for supervising the delivery of cash grants and social services to needy persons in California.<sup>11</sup>

In 1985, the Legislature recognized the need for the development of long-term social and health support services and residential care for the elderly outside the constraints of the Community Care Facilities Act<sup>12</sup> ("CCF Act").<sup>13</sup> The CCF Act:

"was enacted in 1973 with the primary purpose of ensuring that residents of state hospitals would have access to safe, alternative community-based housing. Since that time, due to shortages in affordable housing and a greater demand for residences for the elderly providing some care and supervision, a growing number of elderly persons with health and social care needs now reside in community care facilities that may or may not be designed to meet their needs."<sup>14</sup>

The Residential Care Facilities for the Elderly Act<sup>15</sup> ("RCFE Act") was therefore enacted<sup>16</sup> to provide residential care facilities for the elderly, which are not primarily medically oriented, as an alternative to meeting the housing, social and service needs of older persons in a homelike environment.<sup>17</sup>

Under the RCFE Act, DSS is responsible for licensing and evaluating residential care facilities for the elderly.<sup>18</sup>

Authority 19, 20

Health and Safety Code section 1569.30, subdivision (a) states:

"(a) [DSS] shall adopt, amend, or repeal, in accordance with [the APA], such reasonable rules, regulations, and standards as may be necessary or proper to carry out the purposes and intent of [the RCFE Act] and to enable [DSS] to exercise the powers and perform the duties conferred upon it by [the RCFE Act], not inconsistent with any statute of this state."

Applicability of the APA to Agency's Quasi-Legislative Enactments

As noted above, section 1569.30, subdivision (a) specifically provides that DSS "shall adopt, amend, or repeal, in accordance with [the APA], such reasonable rules, regulations, and standards as may be necessary or proper to carry out the purposes and intent of [the RCFE Act] . . . ."

In any event, the APA applies to all state agencies, except those "in the judicial or legislative departments."<sup>21</sup> Since DSS is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to DSS.<sup>22</sup>

General Background

The following undisputed facts and circumstances have given rise to the present Determination.

On July 13, 1988, the California Association of Health Facilities ("CAHF" or "the Requester") submitted to OAL a Request for Determination concerning the "Medical Level of Care Guidelines" issued by DSS to its local offices on or about July 1, 1988. CAHF describes itself as

"a California nonprofit corporation . . . whose membership includes approximately 900 long-term care facilities operating in California, including skilled nursing facilities and residential care facilities for the elderly. [Par.] [RCFE's] are generally senior residential housing facilities which agree to provide their residents with varying levels and intensities of care and supervision, protective supervision, and/or personal care. . . ."<sup>23</sup>

The Requester alleges that

"The Guidelines are specifically for use by the evaluator personnel in the section of the Department responsible for the licensing and surveying of [RCFE's]. . . . [RCFE's] must be licensed by the Department, and the applicable licensure provisions are found in California Health and Safety Code . . . and in the California Code of Regulations . . . . These [codified] licensing requirements contain some parameters regarding the type of care and supervision services which an [RCFE] may provide a resident. However, . . . they do not expressly authorize, nor do they provide any parameters regarding, the provision of health or medical care services at an [RCFE]."<sup>24</sup>

The Requester further argues that the Guidelines meet the definition of "regulation" and "have been issued without

complying with the procedures required for implementing regulations specified in the APA."<sup>25</sup>

The copy of the Guidelines that the Requester submitted is approximately thirty pages long. The Guidelines list

"eleven specific medical conditions or problems that under certain circumstances would be allowed in an RCFE. The eleven medical conditions or problems consisted of oxygen administration; use of intermittent positive pressure breathing machines; colostomy or ileostomy; enema, suppository and fecal impaction removal; indwelling urinary catheter and catheter procedure; managed bowel and bladder incontinence; contractures; diabetes; injections; care of residents who require protective supervision; and healing wounds. The guidelines also referred to 24 medical conditions or problems that prohibited a person from being kept in an RCFE. These twenty four conditions or problems included the eleven conditions or problems previously mentioned (when mitigating factors do not exist), as well as a number of other conditions such as Stage II, III or IV dermal ulcers and serious infections such as staph infections."<sup>26</sup>

The Guidelines state that its purpose is

"to ensure the protection of the health and safety of all residents in [RCFE's]. [Par.] The guidelines . . . provide procedures for the evaluator to assess the licensee's ability to meet the resident's needs, and provide parameters for the evaluator to utilize in determining whether or not a resident can be cared for in an RCFE. . . . "<sup>27</sup> [Emphasis added.]

Attached to the Guidelines is a copy of the Resident's Health Status form (LIC 9027). The form sets forth the Guidelines in an abbreviated format and divides the health conditions into three categories (based on the Guidelines): (A) Health Conditions Generally Allowed, (B) Conditions Requiring Review, and (C) Prohibited Health Conditions.

In the introduction letter attached to the Guidelines, addressed to "ALL RCFE LICENSEES," DSS describes the form as being

"developed for [DSS] evaluator use to document the health condition of a resident and to assist in the decision-making process. [Par.] . . . The Guidelines will be used in conjunction with the Resident's Health Status form (LIC 9027) to determine whether it is allowable to provide care for a particular resident in an RCFE. . . . [Par.] As always, if you [licensee] are found to have a resident with a prohibited health

condition, you may appeal the citation, and present documentation to support your belief that the health condition falls within the allowable limits for an RCFE. . . ."28 [Emphasis added.]

On October 31, 1988, another Request for Determination was received challenging the same DSS "Medical Level of Care Guidelines." That Request was submitted by the California Association of Homes for the Aging ("CAHA").29 In light of the fact that the current Request before us and the CAHA Request concern the same document, we considered (pursuant to Title 1, CCR, section 124) the CAHA Request as a comment in this determination proceeding.

On January 27, 1989, OAL published a summary of the Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.30

OAL received the Department's Response to the Request for Determination on March 13, 1989. In summary, the Department argues that the Guidelines merely restate existing regulations or contain informational material.

The Department also submitted emergency regulations to OAL on April 11, 1989, codifying the Guidelines.31 These emergency regulations were approved and filed with the Secretary of State on April 18, 1989.32

## II. DISPOSITIVE ISSUES

There are two main issues before us:33

- (1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

" . . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . . " [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

" (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

The answer to the first part of the inquiry is "yes."

For an agency rule to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.<sup>34</sup> The challenged rules apply to, and significantly affect, all current and future licensees and residents of RCFE's statewide. The Guidelines govern what level of medical care and medical procedures may be provided in an RCFE, and assist DSS evaluators in determining whether the RCFE is capable of providing care for a particular resident.

The answer to the second part of the inquiry is also "yes," except where the Guidelines restate regulatory law.<sup>35</sup> These restatements do not (1) establish, modify or supplement a rule of general application, or (2) implement, interpret or make specific the law enforced or administered by DSS or govern DSS' procedures.

Provisions of the Guidelines that do not restate regulatory law, instead implement, interpret or make specific the RCFE Act, which is enforced or administered by DSS. In particular, the Guidelines implement Health and Safety Code section 1569.30, which states:

"The department shall adopt, amend, or repeal, in accordance with [the APA], such reasonable rules, regulations, and standards as may be necessary or proper to carry out the purposes and intent of [the RCFE Act] . . . ." [Emphasis added.]

The Guidelines also implement, interpret or make specific DSS regulations contained in Title 22 of the CCR. For purposes of analysis, we will focus on three particular provisions of the Guidelines as examples of the numerous regulatory provisions in the Guidelines.<sup>36</sup>

Example No. 1

The Guidelines contain a list, two and one-half pages long, which sets forth health services or health conditions that, if required or needed by a person, such person cannot be accepted or retained in an RCFE. This list states the following:

"PROHIBITED HEALTH SERVICES/CONDITIONS

[Title 22, CCR, section 87582 (c)(2)] provides that persons requiring inpatient care in a health facility shall not be accepted or retained. Care for any person requiring health services or having a health condition as specified below is prohibited in a RCFE [emphasis added]:

1. Oxygen therapy other than self-care or care performed by a skilled medical professional on an intermittent basis.
2. Intermittent Positive Pressure Breathing Machine (IPPB) therapy other than self-care or care performed by a skilled medical professional.
3. Colostomy/ileostomy if the resident is not medically stable, the ostomy is not healed, or the resident is not capable of self-care or care is provided by other than a skilled medical professional.
4. Administration of enemas or suppositories by anyone other than the resident or a skilled medical professional.

5. Manual fecal impaction removal by anyone other than a skilled medical professional.
6. Catheter care other than self-care or by a skilled medical professional.
7. Unmanaged incontinence of bowel or bladder where the resident cannot be kept clean and dry or where there is skin breakdown.
8. Disabling contractures that restrict mobility or severely affect functional ability.
9. Diabetic conditions that are metabolically unstable and unmanageable in that daily testing of blood/sugar counts, readjustment of insulin dosage and continuous monitoring is necessary to prevent diabetic coma/shock.
10. Injections, other than those administered by an appropriately licensed skilled medical professional.
11. Injections directly into a vein, including drip IVs.
12. Protective supervision required because of mental impairment to the point that the resident is combative and cannot be adequately cared for without behavioral restraints, including locked doors, to protect himself or others, or requires total care (performance of all activities of daily).
13. Gastrostomy.
14. Wound care requiring irrigation or 24-hour nursing care.
15. Wound care where infection is present.

. . . ."

The list continues with ten more conditions (nos. 16 through 25) which, if required or needed by a person, precludes that person from being accepted or retained in an RCFE.<sup>37</sup> This list of health services or health conditions implements, interprets or makes specific Title 22, CCR, section 87582, subsection (c), which provides:

"(c) The following persons shall not be received into, accepted, and retained by a [RCFE]:

- (1) Persons with active communicable tuberculosis.

(2) Persons who require inpatient care in a health facility.

(3) Persons who are not elderly and who either have needs which are in conflict with the other residents or the program of services offered, or who require more care and supervision than other residents.

(4) Persons whose primary need for care and supervision results from a mental disorder resulting in ongoing behavior which would upset the general resident group, would require a greater amount of care and of care and supervision than the other residents in the facility, or cannot generally benefit from the program of services."

Example No. 2

Part IX, titled "Injections," section C, item number 6 (no. 6) states:

"C. Monitoring Guidelines:

. . . .

6. Injected medication beyond the prescription dosage shall not be used as a chemical restraint."

Part X, titled "Care of Residents Who Require Protective Supervision," section C, item number 6(h) (no. 6(h)) states:

"The supervision of [residents requiring protective supervision] shall not be augmented by the use of locked doors, behavioral restraints, confinement to bed or other forms of restraints."

Item nos. 6 and 6(h), above, implement, interpret or make specific Title 22, CCR, section 87578, which states in part:

"(a) Based on the individual's preadmission appraisal, and subsequent changes to that appraisal, the facility shall provide assistance and care for the resident in those activities of daily living which the resident is unable to do for himself . . . . However, supportive restraints shall not be used in caring for any resident without advance approval by the licensing agency. No other form of restraint shall be allowed. . . . ." [Emphasis added.]

Example No. 3

Part I, section C, item number 14 (item no. 14) states:

"Oxygen equipment must be removed from the facility if

therapy is discontinued or the resident terminates services."

Part II, section C, item number 9 (item no. 9) states:

"[Intermittent Positive Pressure Breathing] equipment must be removed from the facility if therapy is discontinued or the resident terminates services."

Item nos. 14 and 9 supplement Title 22, CCR, section 87575, subsection (d), which provides:

"Prescription medications which are not taken with the resident upon termination of services or which are otherwise to be disposed of shall be destroyed in the facility by the facility administrator and one other adult who is not a resident."

WE THEREFORE CONCLUDE THAT THE CHALLENGED GUIDELINES ISSUED BY DSS ARE "REGULATIONS" AS DEFINED IN GOVERNMENT CODE SECTION 11342, SUBDIVISION (b), AND THEREFORE VIOLATED GOVERNMENT CODE SECTION 11347.5 UP UNTIL THE DATE DSS CODIFIED THE GUIDELINES BY ADOPTING THEM AS EMERGENCY REGULATIONS.

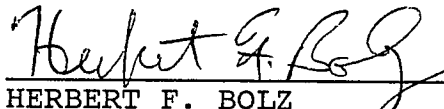
SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

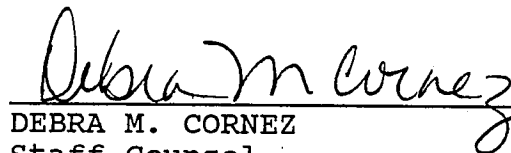
Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.<sup>38</sup> However, none of the recognized exceptions (set out in note 38) apply to the challenged guidelines.

III. CONCLUSION

For the reasons set forth above, OAL finds that the challenged Guidelines are (1) subject to the requirements of the APA, (2) "regulations" as defined in the APA, and (3) therefore violate Government Code section 113437.5, except where the "Guidelines" restate existing statutory or regulatory law. OAL further concludes that upon the filing of DSS emergency regulations with the Secretary of State, thereby codifying the "Guidelines," DSS was no longer in violation of Government Code section 11347.5.

DATE: April 20, 1989

  
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- 1 This Request for Determination was filed by Robert J. Gerst, Esq., Weissburg and Aronson, Inc., 32nd Floor, Two Centruy Plaza, 2049 Century Park East, Los Angeles, CA 90067-3271, (213) 277-2223, on behalf of the California Association of Health Facilities located at 1251 Beacon Boulevard, West Sacramento, CA 95691. The Department of Social Services was represented by Lonnie M. Carlson, Chief Counsel, Lawrence B. Bolton, Assistant Chief Counsel, and Daniel Louis, Senior Staff Counsel, Department of Social Services, Office of Chief Counsel, 744 P. Street, Sacramento, CA 95814, (916) 323-4701.

To facilitate indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination is "239" rather than "1."

- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001); California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism"); Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n. 5, 211 Cal.Rptr. 758, 764, n. 5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); Boreta Enterprises, Inc. v. Department of Alcohol Beverage Control (1970) 2 Cal.3d 85, 107, 84 Cal.Rptr. 113, 128 (where agency had failed to follow APA in adopting policy statement banning licensees from employing topless waitresses, court declined to "pronounce a rule in an area in which the Department itself is reluctant to adopt one," but also noted agency failure to introduce evidence in the contested disciplinary hearings supporting the conclusion that the forbidden practice was contrary to the public welfare and morals because it necessarily led to improper conduct), vacating, (1969) 75 Cal.Rptr. 79 (roughly the same conclusion; multiple

opinions of interest as early efforts to grapple with underground regulation issue in license revocation context); Carden v. Board of Registration for Professional Engineers (1985) 174 Cal.App.3d 736, 220 Cal.Rptr. 416 (admission of uncodified guidelines in licensing hearing did not prejudice applicant); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Pacific Southwest Airlines v. State Board of Equalization (1977) 73 Cal.App.3d 32, 140 Cal.Rptr. 543 (invalidating Board policy that aircraft qualified for statutory common carrier tax exemption only if during first six months after delivery the aircraft was "principally" (i.e., more than 50%) used as a common carrier); Sangster v. California Horse Racing Board (1988) 202 Cal.App.3d 1033, 249 Cal.Rptr. 235 (Board decision to order horse owner to forfeit \$38,000 purse involved application of a rule to a specific set of existing facts, rather than "surreptitious rule-making"); Wheeler v. State Board of Forestry (1983) 144 Cal.App. 3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of proper rule articulating standard by which to measure licensee's competence).

In a recent case, Wightman v. Franchise Tax Board (1988) 202 Cal.App.3d 966, 249 Cal.Rptr. 207, the court found that administrative instructions promulgated by the Department of Social Services, and requirements prescribed by the Franchise Tax Board and in the State Administrative Manual--which implemented the program to intercept state income tax refunds to cover child support obligations and obligations to state agencies--constituted quasi-legislative acts that have the force of law and establish rules governing the matter covered. We note that the court issued its decision without referring to either:

- (1) the watershed case of Armistead v. State Personnel

Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, which authoritatively clarified the scope of the statutory term "regulation"; or

(2) Government Code section 11347.5.

The Wightman court found that existence of the above noted uncodified rules defeated a "denial of due process" claim. The "underground regulations" dimension of the controversy was neither briefed by the parties nor discussed by the court. [We note that, in an analogous factual situation involving the intercept requirements for federal income tax refunds, the California State Department of Social Services recently submitted to OAL (OAL file number 88-1208-02) Internal Revenue Service (IRS) Tax Refund Intercept Program regulations. These regulations were approved by OAL and filed with the Secretary of State on January 6, 1989, transforming the ongoing IRS intercept requirements from administrative directives into formally adopted departmental regulations.]

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index (see note 38, infra).

See also, the following Opinions of the California Attorney General, which concluded that compliance with the APA was required in the following situations:

Administrative Law, 10 Ops.Cal.Atty.Gen. 243, 246 (1947) (rules of State Board of Education); Workmen's Compensation, 11 Ops.Cal.Atty.Gen. 252 (1948) (form required by Director of Industrial Relations); Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56 (1956) (Department of Industrial Relations rules governing electrical wiring in trailer parks); Los Angeles Metropolitan Transit Authority Act, 32 Ops.Cal.Atty.Gen. 25 (1958) (Department of Industrial Relations's State Conciliation Service rules relating to certification of labor organizations and bargaining units); Part-time Faculty as Members of Community College Academic Senates, 60 Ops.Cal.Atty.Gen. 174, 176 (1977) (policy of permitting part-time faculty to serve in academic senate despite regulation limiting service to full-teachers). Cf. Administrative Procedure Act, 11 Ops.Cal.Atty.Gen. 87 (1948) (directives applying solely to military forces subject to jurisdiction of California Adjutant General fall within "internal management" exception); Administrative Law and Procedure, 10 Ops.Cal.Atty.Gen. 275 (1947) (Fish and Game Commission must comply with both APA and Fish and Game Code, except that where two stat-

utes are "repugnant" to each other and cannot be harmonized, Commission need not comply with minor APA provisions).

- 3 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121, subsection (a) provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."  
[Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

- 4 Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['regulation'] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a ['regulation'] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

- 5 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination avail-

able to . . . the courts." [Emphasis added.]

6 Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 and 125. The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

The following persons submitted comments, which were considered in this determination proceeding:

1. Amy J. Hertz, Attorney at Law, on behalf of the Legal Aid Society of Marin County.
2. Frank A. Lalle, Attorney at Law, on behalf of the Legal Aid Society of San Mateo County.
3. Ann Lehman, Executive Director, California Law Center on Long Term Care (CALC).
4. Paul A. Gordon, Attorney at Law, on behalf of the California Association of Homes for the Aging. See also, note 29, infra.

The Department submitted a Response to the Request for Determination on March 13, 1989, which was also considered in this determination proceeding.

- 7 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute).

- 8 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the

Secretary of State on the date shown on the first page of this Determination.

- 9 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL for the purchase price of \$3.00.

- 10 Welfare and Institutions Code section 10600.1.
- 11 Id., section 10600.
- 12 Health and Safety Code sections 1500-1567.4.
- 13 Health and Safety Code section 1569.1.
- 14 Id., subdivisions (c) and (d).
- 15 Health and Safety Code sections 1569-1569.87.
- 16 Statutes 1985, chapter 1127, section 3.
- 17 Health and Safety Code, section 1569.1, subdivision (g).
- 18 Id., section 1569.11.
- 19 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rule-making agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rule-making agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

- 20 We note that the question of whether DSS has the actual Authority to adopt regulations concerning the level of medical care and procedures in RCFE's was raised as an issue in the Request for Determination and in the public comments received, and it was addressed in the Department's Response. We need not, however, resolve this issue in this determination proceeding. Government Code section 11347.5 clearly prohibits any state agency from issuing uncodified rules and standards that meet the definition of "regulation" under the APA, regardless of the agency's Authority to adopt such rules and standards.

Pursuant to Government Code section 11349.6, subdivision (c), if OAL "considers any information not submitted to it by the rulemaking agency when determining whether to file emergency regulations, [OAL] shall provide the rulemaking agency with an opportunity to rebut or comment upon that information." No comments were submitted concerning the emergency adoption. Comments submitted concerning the determination proceeding were not considered by OAL in its review of the emergency adoption. However, DSS must consider public comments concerning the "level of care" regulations before the emergency

regulations can be permanently adopted. Persons concerned about the Authority of DSS to adopt these regulations should submit their comments to DSS during the public comment period. OAL will then carefully review the Authority question following DSS' submission of its proposal to make the emergency regulations permanent.

- 21 Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.
- 22 See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
- 23 Request for Determination, pp. 1-2.
- 24 Request for Determination, p. 2.
- 25 See Request for Determination, p. 4.
- 26 DSS' Response, p. 3.
- 27 Request for Determination, Attachment A, "Medical Level of Care Guidelines," p. 1 (unnumbered).
- 28 See Request for Determination, Docket No. 88-018, attachment.
- 29 Paul A. Gordon, Attorney at Law, of Hanson, Bridgett, Marcus, Vlahos & Rudy, 333 Market Street, Suite 2300, San Francisco, CA 94105-2173, (415) 777-3200, submitted the Request on behalf of CAHA. The CAHA Request was accepted by OAL and assigned Docket No. 88-018.

- 30 Register 89, No. 4-Z, p. 202.
- 31 OAL File No. 89-0411-03E.
- 32 The emergency regulations will be in effect for 120 days from the date of filing with the Secretary of State. During the 120-day period, DSS must formally adopt the regulations and file a certificate of compliance, otherwise the emergency regulations will be repealed. See Government Code section 11346.1.
- 33 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
- 34 Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
- 35 Below are examples of provisions of the Guidelines that are restatements of regulations contained in Title 22 of the CCR:
1. Each of the eleven specified medical conditions has a provision, under the heading "Monitoring Guideline," which states:

"The licensee shall regularly observe the resident for changes and shall provide appropriate assistance when such observation reveals needs which require a change in the existing level of service or possible discharge or transfer to another type of facility."
- This provision restates, in part, section 87591:
- "The licensee shall regularly observe each resident for changes in physical, mental, emotional and social functioning. Documentation of observation is not required, however, the licensee shall provide appropriate assistance when such observation reveals unmet needs which might require a change in the existing level of service, or possible discharge or transfer to

another type of facility. . . ."

2. Each of the eleven specified medical conditions, except "Managed Bowel and Bladder Incontinence" (Part VI) and "Contractures" (Part VII), contains the following provision under "Monitoring Guidelines":

"The licensee shall maintain a record of medical care for the resident."

This provision restates, in part, section 87570:

"(a) A separate record shall be maintained for each resident. . . .

"(b) Each record shall contain at least the following information:

. . . .

(10) Continuing record of any illness, injury, or medical or dental care, when it impacts the resident's ability to function or the services he needs."

3. Part III, titled "Colostomy/Ileostomy," contains the following provision, under the heading "Monitoring Guidelines":

"9. Modified diets prescribed by a resident's physician as a medical necessity shall be provided."

Part VIII, titled "Diabetes," contains the same provision. (See, under the heading "Monitoring Guidelines," item number 6.)

These two provisions restate section 87576, subsection (b) (7):

"Modified diets prescribed by a resident's physician as a medical necessity shall be provided."

4. Part VIII, titled "Diabetes," contains the following provision, under "Monitoring Guidelines":

"3. Licensee shall provide for assisting residents with self-administered medications. However, facility personnel, except those authorized by law, shall not administer injections."

This provision restates, in part, section 87575:

"(a) A plan for incidental medical and dental care shall be developed by each facility. The plan shall . . . provide for assistance in obtaining such care, by compliance with the following:

. . . .

(5) The licensee shall provide for assisting residents with self-administered medications as needed. Facility personnel, except those authorized by law, shall not administer injections but may assist persons with self-administration as needed. . . ."

The above is not intended as an exhaustive list of possible restatements of existing regulatory law contained in the Guidelines.

36 Below are additional examples of the numerous regulatory provisions contained in the Guidelines. Each provision implements, interprets or makes specific regulations contained in Title 22 of the CCR:

1. Each of the eleven specified medical conditions contains, as the first entry under the heading "Monitoring Guidelines," a provision requiring that the physician's medical assessment contain documentation that the specified medical care is required and whether the resident is capable of self-determining when the specified medical care is needed and is capable of administering the medical care or operating the medical equipment. For example, Part I, titled "Oxygen Administration," under "Monitoring Guidelines," item number 1, states:

"Physician's medical assessment must contain documentation that oxygen therapy is required and whether the resident is capable of self-determining when oxygen is needed and is capable of operating his or her own oxygen equipment."

These eleven provisions implement, interpret or make specific sections 87569 and 87588.

2. Part VIII, titled "Diabetes," and Part IX, titled "Injections," contain under the heading "Monitoring Guidelines," a provision (item no. 4 in both cases) which states:

"Sufficient amounts of medicines, testing equipment, syringes, needles and other supplies must be

maintained in the facility and shall be stored properly."

These two provisions implement, interpret or make specific section 87575, subsection (c), which governs the procedure for properly storing medications, and does not require the supply of, or storage of, testing equipment, syringes, needles and other supplies be maintained.

3. Part X, titled "Care of Residents Who Require Protective Supervision," under "Monitoring Guidelines," item no. 6, c through f, sets forth specific precautions which the licensee is responsible for in maintaining safety in the facility. For example, item no. 6 (c) concerns the storage of knives, matches, firearms, and tools; (d) concerns the inaccessibility of over-the-counter and prescription medicines, toiletries and all toxic substances such as plants and cigarettes; (e) requires that yards be completely fenced; and (f) requires that exterior doors include a bell/buzzer or other auditory devices to alert staff when the door is opened.

These provisions implement, interpret or make specific section 87577, subsection (d).

This list is not intended to be an exhaustive list of all regulatory provisions contained in the Guidelines.

- 37 List of the ten additional health services or health conditions which preclude a person from being accepted or retained in an RCFE.
16. Dermal ulcers, Stage II, III or IV. Stage I dermal ulcers are prohibited if it is determined that the reddened area is actually a dermal ulcer.
17. Bedridden. Resident requires assistance in turning or is unable to independently transfer to and from bed. Note: Prohibition of bedridden residents is both a medical level-of-care and fire safety issue. No exception request will be approved unless additional fire safety requirements are met and the facility is granted an appropriate fire clearance.
18. Bedfast. Resident could physically transfer from bed but, for health reasons other than short term illness, has been ordered by a physician to remain in bed for an indeterminate time.
19. Total care: Residents who are dependent on others to perform all activities of daily living for them. This includes bathing, dressing, grooming, feeding, toileting

and mobility.

20. Active communicable disease that must be reported to the local health authority and presents a threat to other persons in the facility.
21. Serious infection including staph infection.
22. PRN medications (as needed) unless the resident is capable of determining when medication is required by him/herself or the doctor has written detailed instructions for the prescription label including symptoms that might require the use of the medication, exact dosage, exact timeframes between dosages and the maximum dosage to be given in a 24-hour period. Facility staff shall telephone the doctor before each dose, explain the symptoms and receive an order to assist the resident in self-administration of that dose of medication.
23. Tracheostomies.
24. Naso-gastric tubes.
25. Multiple conditions requiring skilled nursing care.

Item no. 26 states: "Any condition requiring inpatient care in a health facility." Item no. 26 merely restates Title 22, CCR, section 87582, subsection (c)(2).

38 The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
- c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Kaaren Morris), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$108.

- 39 We wish to acknowledge the substantial contribution of Unit Legal Assistant Kaaren Morris in the preparation of this Determination.